United States
Circuit Court of Appeals
For the Ninth Circuit

XAVIER SERVEL,

Plaintiff in Error,

vs.

G. R. JAMIESON AND MATHIESON MURRAY,
A Co-partnership Doing Business Under the Firm
Name of Jamieson & Murray,

Defendants in Error.

Brief of Plaintiff in Error

F. B. REYNOLDS,
Attorney for Plaintiff in Error.
NORRIS & HURD,
Attorneys for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

XAVIER SERVEL,

Plaintiff in Error,

vs.

G. R. JAMIESON AND MATHIESON MURRAY,
A Co-partnership Doing Business Under the Firm
Name of Jamieson & Murray,

Defendants in Error.

Brief of Plaintiff in Error

STATEMENT OF FACTS.

This action was brought by plaintiff in error against defendants in error to recover damages for failure to deliver sheep in accordance with the terms of a contract, made and entered into by and between the parties herein.

The contract in question was made on or about the 14th day of March, 1917, in the State of Montana, and

provided that defendant should sell and deliver to plaintiff all the wether lambs produced in the year, 1917, by certain bands of ewes owned by defendants, and therein described, delivery to be made between the 25th day of September, 1917, and the 29th of September, 1917, exact date to be at option of plaintiff, at Porcupine Creek, above Nashua, Montana, and at the Town of Saco, Phillips County, Montana.

Plaintiff as party of the second part promised to pay for said lambs, "the sum of ten cents per pound."

It was further agreed, "that said party of the second part has paid at the date of the execution of this instrument the sum of Three Thousand Dollars as a part of the purchase price therefor, receipt whereof is hereby acknowledged by the said parties of the first part, and said party of the second part will pay the remainder of the purchase price of said wether sheep at the time and upon the delivery thereof to said party of the second part by said parties of the first part."

The contract further provided that the wether lambs should remain with their mothers in the corrals over night, and should be cut out the following morning and weighed, and the weights so obtained should be the basis of payment of the purchase price, as hereinabove mentioned.

The contract further provided, "and it is further mutually agreed by and between the parties hereto that time is of the essence of this agreement, and that upon the expiration of the time for delivery, as herein provided, the rights of said party of the second part hereunder shall cease and terminate, and he shall have no right, claim, or interest in and to said sheep after the expiration of said period of time."

Thereafter plaintiff by separate contract made a sale of said wether lambs to Hatcher & Snyder, a stock firm of Denver, Colorado. Thereafter Hatcher & Snyder by separate contract made a sale of said lambs to Patterson & Stitt, of Fort Morgan, Colorado, sheep dealers of that place. Inasmuch as Patterson & Stitt were ultimately to receive these lambs, the plaintiff, instead of going to Montana to receive them personally, authorized C. M. Stitt, of the firm of Patterson & Stitt, to receive said lambs for him.

Mr. Stitt, for the purpose of receiving these lambs, went to Glasgow, Montana, the home of the defendants upon the 25th day of September, 1917, arriving there at about one thirty o'clock in the afternoon. Shortly after arrival he met defendant Jamieson upon the street in Glasgow, and had a conversation with him at that time relative to the delivery of the sheep. He told Mr. Jamieson that he had come to receive the sheep, and that if he would take him out where they were, that he was ready to receive them, to which defendant replied that he was going out to where they were, and would take him out there in his automobile. Thereupon Mr. Stitt went with Mr. Jamieson, first to Nashua, and then from there to Porcupine Creek, which is about five miles north of Nashua, at which place a portion of the lambs were to be delivered, reaching there late in the evening. The next forenoon they started in weighing the lambs. The weighing of the lambs at this point was completed shortly after noon of the 28th inst. Thereupon Mr. Stitt went to Saco to receive the lambs at that point, reaching Saco late at night of the 28th inst. Upon the morning of the 29th inst. they weighed the lambs at Saco,

finishing weighing at about eight o'clock in the morning, or a little later. After the weighing was completed, Mr. Jamieson took Mr. Stitt to Glasgow in his automobile, reaching there at about one o'clock in the afternoon. Mr. Jamieson said that Mr. Murray was at Nashua, and that they should go to Nashua for settlement. Mr. Stitt went by train, understanding that Mr. Jamieson was to come by automobile after he had had his dinner. Mr. Stitt reached Nashua at about two o'clock, and searched for Mr. Murray, but he was not there, so Mr. Stitt secured an automobile and went back to Glasgow, reaching there at about four o'clock of that afternoon. This was on Saturday, September 29th.

After reaching Glasgow he met defendants upon the street, and told them that he was ready to settle for the lambs. Defendant Murray asked him how he wanted to pay for them, and he told them that he would give them a check, to which Mr. Murray replied, "If you haven't got the currency, you cannot have the lambs, and if you have, you can, but we won't accept a check." Mr. Stitt told him that he did not have thirty thousand dollars in his pocket, but he could get it if it was necessary. He told him that he always had bought lambs by check, and had never given the currency before. He also told them that his check was good, and that he could prove that his check was good, and would wire his bank and have them guarantee it. He also offered to leave the sheep with them until he got the money, and to pay them for whatever expense or damage might be incurred by their so keeping them until he would get the money. He also offered to draw a draft upon Hatcher & Snyder, and stated that they would pay it. He also said, in regard

to the currency, that he would get it just as soon as it could be transmitted by wire. The banks were closed and it was Saturday. They said that the time was up, and that he could not have the lambs.

Mr. Stitt testified that at the time he had made arrangements with his bank for payment of his check. This testimony, however, was stricken out upon motion of defendant, over objection of plaintiff. Plaintiff then offered to prove by Mr. Stitt that he had made arrangements with the bank at Fort Morgan, Colorado, for payment of any check that he might draw on it, which offer was refused.

Plaintiff offered to show by Mr. Stitt that he could have produced the currency or legal tender for payment of the lambs in question just as soon as it could be procured by telegram from his bank at Fort Morgan, Colorado, and would have done so if defendants had not told him that it would be useless, which offer was refused.

Plaintiff also offered to prove by C. M. Stitt that his bank at Fort Morgan, Colorado, telegraphed to defendants, guaranteeing to pay his check for the lambs in question, and that defendants admitted to him that they had received said telegram, which offer was refused.

Plaintiff also offered to prove by Mr. Stitt that defendants admitted on Sunday, September 30th, that they had received a telegram from the Montana National Bank at Billings, guaranteeing the payment of any draft that he might draw on Hatcher & Snyder in payment of the lambs in question, which offer was refused.

Plaintiff also offered to prove by Mr. Stitt the service upon defendants, upon the 30th day of September, 1917,

of a written offer to procure the legal tender money as soon as the banks would open upon Monday morning in payment of the sheep in question, and also to compensate defendants for any damage that they might suffer by reason of holding the sheep until that time, being document marked in the case as Exhibit No. 3, which offer was refused.

Plaintiff also offered in evidence deposition of L. M. Meeker, cashier of the First National Bank of Fort Morgan, Colorado, showing that the firm of Patterson & Stitt had made arrangements for a credit of One Hundred Thousand Dollars, and C. M. Stitt for a credit of Seventy-five Thousand Dollars with said bank, and that before Mr. Stitt left for Montana he had made arrangements with said bank to take care of any check that he might draw in payment of said lambs; that said bank would have honored his check for any amount up to at least Forty Thousand Dollars; that its resources at that time were over One Million Dollars; that its cash on hand was One Hundred Seventy-five Thousand Dollars, and that he, as Cashier, had sent a telegram guaranteeing the payment of any check that would be drawn upon said bank, which offer was refused.

Plaintiff also offered to show, by plaintiff and by said C. M. Stitt, that neither one of them had received any notice whatever that defendants would require legal tender money in payment of the lambs in question until the demand was made upon Mr. Stitt about four o'clock the afternoon of Saturday, the 29th inst., which offers were refused.

Plaintiff also offered to show, by witness James E. Rea, who had qualified on the stand as an expert sheep man, that it is, and has been for many years, the custom in all parts

of Montana, and in the northwestern states generally among sheep men, to pay for their purchase of sheep by means of a check or draft, and that such is true regardless of the amount of money involved, and that it is the custom of the vendor to notify the vendee that the payment of a check or draft must be guaranteed by bank upon which it is drawn if he has any objections to the check, and in time that such guaranty can be procured by the time fixed for delivery, and that custom applies to the payment by check or draft drawn upon bank in a sister state, the same as though drawn on a bank in the State of Montana, which offer was refused.

Plaintiff took exception to each of the rulings of the Court in sustaining objection to the several offers.

After plaintiff, by his representative, Mr. Stitt, had made all of the offers to defendants, and they were refused by them, they, the next morning, sold and delivered said sheep to one Johnson. The contract price of the lambs in question was ten cents per pound, while, at the time of delivery, they were fifteen cents per pound, as appears from the offer of proof by witness, James E. Rea, this making a difference between the contract price of the lambs and the value thereof at the time fixed for delivery of the sum of Fifteen Thousand Six Hundred Sixty-six and 21-100 Dollars. This action was, therefore, brought to recover the down payment of Three Thousand Dollars, together with damages in the amount of difference, as above set forth.

The down payment of Three Thousand Dollars was made upon this contract by plaintiff's personal check, drawn upon a Utah Bank, to which no objection was made.

At the conclusion of plaintiff's evidence, upon motion

of defendants, the Court directed a verdict in favor of defendants, upon the ground that plaintiff had failed to perform his obligation under the contract to make payment for the lambs in question.

The vital question is, whether or not, under the circumstances of this case, plaintiff forfeited his right to a delivery of the lambs in question under said contract, or, in default thereof, his right of action on the contract for damages.

SPECIFICATIONS OF ERROR.

I.

The Court erred in sustaining objection of defendants to testimony of plaintiff,, which testimony, objection, and ruling were as follows, to-wit:—

"I did not at any time receive any advice, directly or indirectly, from the defendants that they would not accept check in final settlement."

MR. HURD: That is objected to as incompetent, irrelevant and immaterial, and no foundation laid for it.

THE COURT: Sustained.

MR. REYNOLDS: Exception. (Record ——)

II.

The Court erred in sustaining objection of defendants to testimony of C. M. Stitt, which testimony, objection, and ruling were as follows, to-wit:—

"At the time I had made arrangements with a bank for the payment of my check."

MR. NORRIS: Just a moment. Any arrangement he had for the payment of the check is not in compliance with the terms of the contract.

THE COURT: The objection will be sustained. (Record ——)

III.

The Court erred in sustaining objection of defendants to plaintiff's offer of proof by his witness Stitt, which offer, objection, and ruling were as follows, to-wit:—

MR. REYNOLDS: Plaintiff offers to prove by witness Stitt upon the stand, that he had made arrangements with bank at Fort Morgan, Colorado, for payment of any check that he might draw on it in payment of the lambs in question.

MR. HURD: To which offer the defendants object, for the reason that the matter offered to be proved by this witness is irrelevant and immaterial, and does not tend to show any compliance with the terms of the contract, and there is no foundation laid for any such testimony.

THE COURT: The objection to the offer will be sustained.

MR. REYNOLDS: Exception. (Record ——)

IV.

The Court erred in sustaining objection of defendants to question of plaintiff's attorney to witness C. M. Stitt, which question, objection, and ruling were as follows, to-wit:—

Q. Mr. Stitt, were you able at that time to produce the currency just as soon as it could be wired from the Bank?

MR. NORRIS: We object to his ability to produce it later.

THE COURT: Sustained. (Record ——)

V.

The Court erred in sustaining objection of defendants to question of plaintiff's attorney to witness C. M. Stitt,

which question, objection, and ruling were as follows, to-wit:—

Q. Mr. Stitt, if the defendants had acquiesced in that offer of the currency and had not refused to accept it, would you have produced the currency for the payment of the lambs by wire?

MR. NORRIS: We object to that on the ground that the evidence sought to be brought out by this witness is irrelevant, incompetent, and immaterial, and there is no foundation laid, and therefore, it is not responsive nor illustrative of any issue in this case, and instead of showing a compliance with the contract, it is practically opposed by the terms of the contract.

THE COURT: Sustain the objection. (Record ——)

VI.

The Court erred in sustaining objection of defendants to plaintiff's offer of proof, which offer, objection, ruling, and exception were as follows, to-wit:—

MR. REYNOLDS: Plaintiff offers to prove by the witness Stitt upon the stand, that he could have procured the currency or legal tender for payment of lambs in question just as soon as it could have been procured by telegram from his Bank at Fort Morgan, Colorado, and would have done so if defendants had not told him that it would be useless.

MR. NORRIS: We object to the offer of the testimony because of the fact that it is incompetent, irrelevant and immaterial and has no pertinent value in the case and is not responsive to the issues set forth in the pleadings, nor is it justified by any evidence heretofore produced, and there is

no foundation laid for it, and it is indefinite as to the time when this money could have been produced, and by reason of the further fact that on account of the indefinite character of the proposed offer of testimony, it cannot be determined whether or not the witness could or would have produced that money on that date, or at some subsequent time.

THE COURT: Objection sustained.

MR. REYNOLDS: Exception. (Record ——)

VII.

The Court erred in sustaining objection of defendants to question of plaintiff's attorney to Witness C. M. Stitt, which question, objection, ruling, and exception were as follows, to-wit:—

"I did have a conversation upon Sunday, the 30th of September, with one of the defendants, relative to having received a message from my Bank at Fort Morgan."

Q. And what was that conversation?

MR. NORRIS: To which we object, your Honor, as incompetent, irrelevant, and immaterial. This is introduced evidently for the purpose of showing that on the day succeeding the date the contract expired, this conversation was had, and showing no attempt to comply with the terms of the contract.

THE COURT: The objection will be sustained.

MR. REYNOLDS: Exception. (Record ——),

VIII.

The Court erred in sustaining objection of defendants to plaintiff's offer of proof by witness C. M. Stitt, which offer, objection, ruling, and exception were as follows, to-wit:—

MR. REYNOLDS: Plaintiff offers to prove by witness Stitt on the stand, that his Bank at Fort Morgan, Colorado, telegraphed to defendants, guaranteeing to pay his check for the lambs in question, and that defendants admitted to him that they had received said telegram.

MR. NORRIS: To which offer the defendants object, for the reason that the same is incompetent, irrelevant, and immaterial, and does not show a compliance with the terms of the contract, and in fact shows that the terms of the contract were not and had not been complied with, as the evidence sought to be introduced would detail facts and circumstances occurring after the expiration of the date on which the contract was to have been performed, and does not tend to show an attempt to perform under the conditions of the contract on the date that the contract required it to be peformed.

THE COURT: Sustained.

MR. REYNOLDS: Exception. (Record ——)

IX.

The Court erred in sustaining objection of defendants to question of plaintiff's attorney to witness C. M. Stitt, which question, objection, ruling, and exception were as follows, to-wit:—

Q. Did you, on the 30th day of September, have a talk with the defendants, or either of them, relative to the reception of a message by them, from the Bank of Montana, relative to the payment of any draft you might drawn on Hatch & Snyder?

MR. NORRIS: To which we object, your Honor.

THE COURT: Sustained.

MR. REYNOLDS: Exception. (Record ——)

X.

The Court erred in sustaining objection of defendants to plaintiff's offer of proof by witness Stitt, which offer, objection, ruling, and exception were as follows, to-wit:—

MR. REYNOLDS: Plaintiff offers to prove by witness Stitt upon the stand, that defendants admitted to him on Sunday, September 30th, that they had received a telegram from Montana National Bank of Billings, guaranteeing any draft that he might draw on Hatcher & Snyder, in payment of the sheep in question.

MR. NORRIS: To which we object.

THE COURT: Sustained.

MR. REYNOLDS: Exception. (Record ——)

XI.

The Court erred in sustaining objection of defendants to plaintiff's offer of Exhibit 3, which offer, objection, ruling, and exception were as follows, to-wit:—

Document marked Exhibit 3.

"This is the notice I gave Mr. Murray the 30th of September."

MR. REYNOLDS: We offer this in evidence.

MR. NORRIS: To which offer of the plaintiff, proposed Exhibit 3 in evidence, the defendants object, for the reason that the same is incompetent, irrelevant, and immaterial, and no foundation has been laid for it, and it does not tend to prove or disprove any facts material to this case, nor is it supported by any testimony herein, and on its face shows that the notice was given on September 30th, the day following the date on which contract was to have been performed, and the contract had expired.

THE COURT: The objection will be sustained)

MR. REYNOLDS: Exception. (Record ——)

XII.

The Court erred in sustaining objection of defendants to the offered evidence of the deposition of L. M. Meeker, Cashier of the First National Bank of Fort Morgan, Colorado, which offer, objection, ruling, and exception were as follows, to-wit:—

MR. RENOLDS: I have here a deposition from the Cashier of the Fort Morgan Bank which I offer in evidence, but assume that there will be an objection to it.

MR. NORRIS: The deposition and the fact that it is a deposition and the manner of its taking, or the irregularity of its taking, will not be objected to, but the deposition is objected to on the ground that it is incompetent, irrelevant, and immaterial, and not tending to show anything in compliance with the terms of the contract, and the same objections that have heretofore been made.

THE COURT: Objection sustained.

MR. REYNOLDS: Exception. (Record ——)

XIII.

The Court erred in sustaining objection to plaintiff's application for leave to amend his complaint, which proposed amendment, objection, ruling, and exception were as follows, to-wit:—

MR. REYNOLDS: May it please the Court, I would ask the Court for leave to amend the complaint by adding at the end of paragraph 5 of the complaint the following:

"That the above mentioned offer was made by valid check and draft after the banks had closed on the 29th day

of September, 1917; that said check and draft were refused; that the plaintiff thereupon offered to secure the legal tender money for such payment as soon as it could be telegraphed to Glasgow, Montana, from his home at Fort Morgan, Colorado, and that the defendant refused said offer, and thereupon sold said lambs to one Johnson."

MR. NORRIS: May it please the Court, we object for the reason that it doesn't change the issue in the case and is not material under the issues of the case, and it would not admit evidence that would be competent, and that it contradicts the preceding part of said paragraph 5 and other portions of the complaint, and that contradicts the complaint itself.

THE COURT: The proposed amendment does not benefit the plaintiff's case any, and the objection will be sustained.

MR. REYNOLDS: Exception. (Record ——)

XIV.

The Court erred in sustaining objection of defendants to offer of plaintiff by witness James E. Rea, which offer, objection, ruling, and exception were as follows, to-wit:—

MR. REYNOLDS: Plaintiff offers to show by witness James E. Rea on the stand, that the market value of lambs in question at weighing points, near Nashau and Saco on the 29th day of September, 1917, was fifteen cents to fifteen and one-half cents per pound.

MR. HURD: The offer is objected to on the ground that the evidence proposed to be offered is irrelevant and immaterial, and there is no foundation laid for it, and that there has not at this time been shown any violation of the terms and provisions of the contract.

THE COURT: Yes, this offer to show the value of the lambs is immaterial, as the plaintiff did not comply with the contract, and the matter of the value is entirely irrelevant. The objection will be sustained.

MR. REYNOLDS: Exception. (Record ——)

XV.

The Court erred in sustaining objection of defendants to question of plaintiff's attorney to witness James E. Rea, which question, objection, ruling, and exception were as follows, to-wit:

Q. Is there, or is there not, a custom relative to the method of payment of the purchase price of sheep, and if so, was there such a custom in force in September, 1917?

MR. NORRIS: To that we object, on the ground that it is incompetent, irrelevant, and immaterial, and no foundation has been laid for it, and on the ground that it calls for the conclusion of the witness.

THE COURT: Objection sustained.

MR. REYNOLDS: Exception. (Record ——)

XVI.

The Court erred in sustaining objection of defendants to plaintiff's offer of proof by the witness James E. Rea, which offer, objection, ruling, and exception were as follows, to-wit:—

MR. REYNOLDS: Plaintiff offers to show, by witness James E. Rea on the stand, that it is, and has been for many years, the custom in all parts of Montana and in the northwestern states generally among sheep men to pay for sheep purchased by means of a check or draft, and that such is true regardless of the amount of money involved, and that

it is the custom of the vendor to notify the vendee that the payment of the check or draft must be guaranteed by bank upon which it is drawn if he has any objection to the check, and in time that such guarantee can be procured by the time fixed for delivery, and that such custom applies to the payment by check or draft drawn on bank or person in a sister state, the same as though drawn on a bank in the State of Montana.

THE COURT: Do you renew the objection?

MR. NORRIS: Yes.

THE COURT: It will be sustained.

MR. REYNOLDS: Exception. (Record ——)

XVII.

The Court erred in sustaining objection of defendants to plaintiff's offer of proof by himself, a witness on the stand, which offer, objection, ruling, and exception were as follows, to-wit:—

MR. REYNOLDS: Plaintiff offers to prove by plaintiff Xavier Servel on the stand, that he never had any notice from defendants, either directly or indirectly, that they would require currency for final payment on the contract in question.

MR. NORRIS: To the offer we object, on the ground stated in our objections to that line of testimony.

THE COURT: Objection sustained.

MR. REYNOLDS: Exception. (Record ——)

XVIII.

The Court erred in sustaining objection and motion to strike out testimony made by defendants as to the testimony of C. M. Stitt, which testimony, objection, ruling, and exception were as follows, to-wit:—

"Neither of the defendants at any time gave me any notice, either directly of indirectly, before about 4:30 P. M. of the 29th of September, 1917, that they would require legal tender money for final payment on the contract in question."

MR. HURD: We ask that the answer be stricken out, and we object on the ground that it is incompetent, irrelevant, and immaterial.

THE COURT: Just as the Court stated before, no notice was necessary under the law. Objection sustained.

MR. REYNOLDS: Exception. (Record ——)

XIX.

The Court erred in sustaining objection of defendants to offer of proof of plaintiff by witness C. M. Stitt, which offer, objection, ruling, and exception were as follows, to-wit:—

MR. REYNOLDS. Plaintiff offers to prove by C. M. Stitt, witness on the stand, that he did not receive any notice of any kind from defendants before 4:30 P. M. of the 29th day of September, 1917, that they would require legal tender money for final payment on the contract in question.

MR. HURD: The offer of proof is objected to on the ground stated in the former objection.

THE COURT: Sustained.

MR. REYNOLDS: Exception. (Record ——)

XX.

The Court erred in sustaining motion of defendants for directed verdict, which motion, ruling, and exception were as follows, to-wit:—

MR. HURD: At this time, may it please the Court,

we ask for a directed verdict in favor of the defendants.

THE COURT: This motion for directed verdict will be granted. It is only a question of law, gentlemen of the jury, and the Clerk will enter such a verdict of record.

MR. REYNOLDS: Exception.

THE COURT: The exception will be noted. (Record ——)

XXI.

The Court erred in rendering judgment in favor of the defendants herein.

ARGUMENT.

A.

Specifications of error numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, and 21 involve the general proposition that under the circumstances of this case, defendants had no right to declare the contract forfeited and refuse to make delivery of the sheep in question to plaintiff, and therefore will be considered together upon this general proposition.

The rule is well established that in ordinary contracts for sale of sheep, time is never deemed of the essence of the contract unless expressly so provided.

Curtis & Freeman vs. Parham, 49 Mont., 140.

Rev. Codes of Mont., 1907, 5047.

When time is not of the essence of the contract, neither party can rescind or claim a violation of the contract after performance becomes due, without giving the other party an opportunity to make tender of performance, and, on the other hand, the duty is imposed on the other party to the contract, to make, within a reasonable time after the performance is

due, a tender of performance, unless excused therefrom by the attitude of the first party.

Curtis & Freeman vs. Parham, supra.

Rev. Codes of Mont., Sec. 4963.

It is, therefore, clear that if it was not for the fact that the contract in question in this case contains a clause whereby time is made of its essence, defendants, under the circumstances of this case, would not have had any right whatever to declare the contract forfeited on the part of plaintiff.

The only question, then, is whether or not, under the circumstances of this particular case, with such a clause as above mentioned in the contract, defendants were justified in declaring the contract forfeited. It is the contention of plaintiff that defendants were not justified in so doing.

In support of plaintiff's contention, he will set forth three different propositions, which separately and collectively sustain such contention, and which will be discussed in their order.

1.—The conduct of defendants constituted an attempted forfeiture of plaintiff's interest in the contract in question, and, under the circumstances of this case, it will be unconscionable for the Court to permit defendants to enforce such forfeiture.

2.—Plaintiff's offered performance was sufficiently substantial to entitle him to sustain an action upon the contract.

3.—Plaintiff having made tender of payment within the time limited by the contract, in accordance with the custom of the country and commercial usage, the obligation rested upon defendants; upon their demand for legal tender money, to give to plaintiff reasonable time within which to

procure such legal tender money, before they could treat the contract as forfeited by plaintiff.

I.

Any forfeiture of the contract in question, as sought to be made by defendants under the circumstances of this case would be manifestly unfair and unconscionable, and should not be permitted.

Plaintiff, in good faith, sent his representative, C. M. Stitt, to the places at which delivery was to be made, in ample time to receive the sheep within the time limited by the contract. He was met by one of the defendants, and together they went to the several places in the country where the sheep were being kept, counted and weighed them. As the lambs were kept in different places, it required substantially a day and a half for such work of counting and weighing, the same being completed the forenoon of Saturday, September 29th, the last day upon which delivery was to be made. He offered settelment to defendant Jamieson, who referred him to defendant Murray. It was agreed between them that Mr. Stitt should go to Nashua, where a portion of the lambs were to be shipped, and at which point defendant Jamieson told plaintiff Mr. Murray was. It was understood that defendant Jamieson after lunch should follow by automobile, Mr. Stitt going by train. Mr. Stitt went to Nashua, failed to find defendant Muarry, and thereupon returned to Glasgow, where he met both of them about four o'clock in the afternoon. the banks being closed at that time. He offered payment by check, which was refused. He offered to have his check guaranteed by the bank upon which it was to be drawn, which offer was refused. He offered to draw a draft

upon Hatcher & Snyder, stating that it would be honored, and offered to secure assurance from Hatcher & Snyder that such draft would be honored, but such offer was refused. He then stated that he was not carrying thirty thousand dollars in cash upon his person, but that he would procure the legal tender money just as soon as it could be wired from Fort Morgan, Colorado, which would necessarily involve a delay until the banks should open the next Monday morning, and also offered to allow defendants to keep the lambs until such money was received, and to pay them all damage and expense incurred by so doing. This offer was also refused.

Regardless of the refusals of defendants, Mr. Stitt wired and secured that day a message from his bank at Fort Morgan, Colorado, to defendants, guaranteeing payment of any check that would be drawn in payment of the sheep in question. The responsibility of the bank was ample to protect the payment of such check. He also wired Hatcher & Snyder, and telegrams were received the next morning from both Hatcher & Snyder and the Montana National Bank, a live bank of Billings, guaranteeing the payment of any draft that should be drawn by him upon Hatcher & Snyder.

The Court will doubtless take judicial notice of the fact that comparatively few obligations are met by the payment of legal tender, practically all the business of the country being conducted upon a credit basis by means of checks and drafts. Plaintiff was ready, able, and willing to perform all his obligations under the contract, and offered so to do within the time limited by the contract, and in accordance with the universal method of performance in commercial dealings, and, as plaintiff offered to show upon trial, particularly in

accordance with the custom prevailing in the matter of making payment upon sheep contracts.

Upon being advised that such manner of performance would not be acceptable, he then offered to procure the legal tender just as soon as a telegram could bring it from Fort Morgan, Colorado, to Glasgow, Montana, and payment thereof could be had through the bank. This was all that any person could reasonably expect under the circumstances.

Forfeiture has been defined by the Court as follows:

> "A forfeiture is where a person loses some right, property, privilege, or benefit in consequence of having done or omitted to do a certain act."
>
> Vol. 2, Words & Phrases, 611. 2nd Ed.
>
> "Forfeiture usually signifies loss of property by way of compensation for injury to the person to whom the property is forfeited, as well as punishment."
>
> Idem.
>
> "Forfeiture is a penalty for doing or omitting to do a certain required act."
>
> Idem.

It is evident, then, that if under the circumstances of this case, defendants are to be deemed justified in refusing delivery of the lambs in question, plaintiff will suffer a forfeiture by losing a substantial right or interest in the contract and in the sheep to be delivered thereunder, merely because he did not have nearly Thirty Thousand Dollars in legal tender money on his person.

It is elementary that forfeitures are not favored, and that they will not be enforced where they will work an injustice. The Montana Supreme Court has been especially em-

phatic in denouncing forfeiture in such cases.

Courts will not enforce forfeitures when enforcement thereof would be unconscionable.

Fratt vs. Daniels-Jones Co., 133 Pac., 700. See 702 2nd column. (Mont.)

Cook-Reynolds vs. Thipman, 47 Mont., 298. See 300. 6th line from bottom. 133 Pac., 694.

Suburban Homes Co. vs. North, 50 Mont., 108. See 118, middle of page. 145 Pac., 2.

Forfeiture will not be enforced when "the party for whose benefit it was inserted had waived the provision or is estopped to insist upon its enforcement, or performance has been prevented by some intervening circumstances sufficient to relieve the party from the performance of any other provision of the contract."

Fratt vs. Daniels-Jones Co., supra.

A party will be relieved from forfeiture, "if his breach of duty was not grossly negligent, wilfull or fraudulent."

Cook-Reynolds Co. vs. Thipman, supra.

While the foregoing cases involve forfeitures of land contract, and the facts are not similar, yet the principle is the same. No forfeiture should, therefore, be permitted when the "breach of duty was not grossly negligent, wilfull, or fraudulent." Plaintitff does not concede that he was guilty of any breach of duty, but even though he was, it was not grossly negligent, wilfull, or fraudulent.

The offered performance by plaintiff was made in good faith, and was designed to secure to defendants all the benefits reserved to them by the contract, would have done so if accepted, and when it was refused, plaintiff offered to make

payment by legal tender money just as soon as the telegraph wires could transmit it, all of which offers were refused.

Such refusals on the part of defendants evidently were not made in good faith, but in avoidance of the contract, for if defendants merely desired what was coming to them, they could not consistently have rejected all these offers. By reason of the advance price of lambs between the date of the contract and the time of maturity, their value at time of delivery was approximately Fifteen Thousand Dollars more than the contract price, making a very strong inducement to make an excuse, no matter how slight, for repudiation of the agreement.

Furthermore, such suspicion is emphasized by the fact that not one word was said by either of the defendants to plaintiff or Mr. Stitt about legal tender until after the banks were closed upon Saturday, the 29th day of September, and they knew that it was then impossible to secure it. When plaintiff offered settlement to defendant Jamieson at about noon of that day, there was then probably time within which legal tender money could have been procured upon that day, but in furtherance of their design, defendant Jamieson sent Mr. Stitt upon a fruitless chase to Nashua, whereby the time between noon and the closing of the banks was consumed.

Under ordinary circumstances, and particularly in case the price of lambs hade gone down instead of having become higher, if plaintiff had tendered defendants legal tender money, they doubtless would have objected to it, and would have insisted upon his giving a check or draft, perhaps, with a guaranty of its payment. In this case, however, they waited until they knew it was physically impossible

for him to produce the legal tender until the following Monday morning, and then made the demand, not because they wanted it, but because they perceived a chance to use that pretext as a means of escaping their obligation to deliver to plaintiff the sheep in question.

The courts are constituted to insure honest and fair dealing between men, and to punish fraud and deceit. If defendants are permitted to escape their obligations under this contract in the manner in which they have attempted to do, then the result is punishment for him who has, in good faith, attempted to fulfill his agreement, and reward for him who, by fraud and trickery, seeks to avoid his obligations.

II.

Plaintiff contends that his offer of performance was substantial and such as was contemplated by the parties at the time of making the contract, and was, therefore, sufficient upon which to base an action to recover thereon.

Where one has offered to make payment by medium which is recognized as a customary and usual method of payment, the contract itself not requiring payment by any particular kind of money or currency, and as soon as he is informed that legal tender money will be required, offers to procure such legal tender money just as soon as it can be transmitted by telegram, and such offer has been refused by the promisee, then he has made such substantial performance as will sustain an action upon the contract.

The general rule is nicely stated in R. C. L. as follows:

> "By the common law, a party to a contract was compelled to show a literal performance of the stipulations of it before he could claim damages for a non-

> performance against the other. Expressions in some of the more recent cases seem to indicate a tendency to relax the rigor of this rule. Thus, it is said that the law looks to the spirit of a contract and not the letter of it, and that the question therefore is not whether a party has literally complied with it, but whether he has substantially done so. Other courts have said that substantial, and not exact, performance, accompanied by good faith, is all the law requires in case of any contract to entitle a party to recover on it. Although a plaintiff is not absolutely free from fault or omission in every particular, the court will not turn him away if he has in good faith made substantial performance, but will enforce his rights on the one hand, and preserve the rights of the defendant on the other, by permitting a recoupment."
>
> 6 R. C. L., Contracts, Sec. 342.

While the foregoing statement of the law is especially applicable to performance of contracts whereby work and materials are to be furnished, nevertheless, the same principle is applicable to any kind of performance.

> "It has been frequently held that acts, insufficient in themselves to make a complete tender, may operate as proof of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is made impossible by reason of circumstances not due to fault of the tenderer."
>
> *Shaeffer vs. Coldren*, 85 Atl. 98.
>
> *Hault vs. Unger*, 71 Atl., 843. (See 844, 2nd col.)
>
> 29 Am. and Eng. Enc'y of Law (2nd Ed.) 697.

In the case of Shaeffer vs. Coldren, supra, action was brought upon option contract, of which time was necessarily of its essence. The plaintiff tried to make tender to defendant on the evening of Saturday, the last day in which the contract could be complied with, but he could not do so because of being unable to find defendant. He renewed the

offer the next Monday morning. It was held that he had not forfeited his contract.

"In the absence of any provision in the contract, or of any circumstances excluding it, contracts for the payment of money refer to the ordinary and usual currency in which business is transacted."

30 Cyc., 1210.

Fabbri vs. Kalbfleisch, 52 N. Y., 28.

"'Money' covers anything representing property, and passing as such in current business transactions."

Hendry vs. Benlisa, 20 So., 800.

"The time, place, and mode or manner of payment are usually fixed by contract, though when not so fixed the law or even custom, or the course of dealing between the parties, and like circumstances, may determine it."

3 Elliott on Contracts, Sec. 1930.

U. B. Blalock & Co., vs. W. D. Clark & Bros., 49 S. E., 88. (N. C.)

"The eleventh prayer was, 'that, before the plaintiff would be entitled to recover, he must satisfy the jury by a preponderance of the evidence that at the time he demanded the cotton he had then and there the money to pay for the cotton,' which the Court gave, but added, 'or was able, ready and willing to pay for the cotton according to the custom of the community in buying and paying for cotton in large lots, of 160 bales or more, by giving valid checks for the same, or by shipping with bill of lading attached to sight draft, if the jury shall find by a preponderance of the evidence that there was a well known and established custom in that community to pay for cotton in such lots in that way, and if the jury shall further find by a preponderance of the evidence that there was nothing said in the contract, or at the time of making it, about how the cotton should be paid for.'"

U. B. Blalock & Co. vs. W. D. Clark, 49 S. E., 88. (N. C.)

"Stipulations which are necessary to make a contract reasonable, *or conformable to usage*, are implied, in respect to matters concerning which the contract manifests no contrary intention." (Italics ours.)

Rev. Codes of Mont., 1917, Sec. 5044.

The contract in this case contained nothing whatever as to manner or medium of payment, it merely providing that plaintiff should pay "the sum of ten cents per pound." As suggested in the approved instruction in the last above cited case, and in the quoted statute, when plaintiff made tender of payment, in accordance with the established custom for the payment of sheep, he did all that was contemplated by the parties at the time of the making of the contract, and as was implied therein. When he signed the contract, he in effect said, "I will receive these sheep not later than the 29th of September, 1917, and will pay for them by the usual medium of exchange," and, in compliance therewith, he was at points of delivery promptly on time to receive them and to pay for them as promised.

The fact that defendants accepted a check upon a Utah bank for first payment upon the contract sustains such an interpretation. The Courts will construe a contract as the parties themselves have construed it.

National Bank of Gallatin Valley vs. Ingle, 53 Mont., 415.

The fact that afterward the legal tender money was not actually produced is immaterial, inasmuch as defendants advised plaintiff that even though it should be produced, it

would not be accepted. The law does not require any party to do an idle and useless thing.

An offer to perform is equivalent to performance for the purpose of sustaining an action for damages.

Rev. Codes of Mont., 1907, Sec. 4929. 8036.

6 R. C. L., Sec. 330.

Lehrkind vs. McDonnell, 51 Mont., 343. See 350.

The thing to be delivered, if any, need not in any case be actually produced upon an offer of performance, unless the offer is accepted.

Rev. Codes of Mont., 1907, Sec. 4940.

Lehrkind vs. McDonnell, 51 Mont., 343.

If a debtor is ready, able, and willing to pay, the actual production of it may be waived by the absolute refusal of the creditor to accept it.

3 Elliott on Contracts, Sec. 1970.

Sonia Cotton Oil Co. vs. Steamer "Red River," 30 So., 303.

McPherson vs. Fargo, 74 N. W., 1057.

3 Elliott on Contracts, Sec. 1972.

Woods vs. Bangs, 48 Atl., 189. (Pa.)

Blair vs. Hamilton, 48 Ind., 32.

Hazard vs. Loring, 10 Cush., 267. (Mass.)

Jones vs. Preferred Bankers, etc., Assur. Co., 79 N. W., 204. (Mich.)

Stephenson vs. Kilpatrick, 65 S. W., 773. (Mo.)

Rogers vs. Tindall, 42 S. W., 86. (Tenn.)

Tender is not necessary where it would be a useless ceremony or the vendor has repudiated the contract.

39 Cyc. 2089.

Thus, plaintiff acted with the usual business caution, and in accordance with business principles, and, having tendered such performance, he substantially, at least, performed his obligations under the contract, and is entitled to sustain his action thereon for damages.

III.

When plaintiff tendered his valid check in payment on the contract, and defendants refused to accept the same and demanded currency or legal tender, then the obligation rested upon them to give to plaintiff a reasonable time within which to procure such legal tender.

Plaintiff tendered payment within the time and in the manner contemplated by the contract, and in accordance with the usage and custom covering such transactions. Payment by legal tender would be an unusual method of payment, and one for which it could not be expected that he would be prepared. Often times it is necessary, in receiving sheep in the State of Montana, to go long distances in the country to weigh and receive them, far from the protection that society affords in the city. The contract frequently involves considerable money, and it would be deemed foolhardy and unbusinesslike for any person to carry with him large sums of money, such as approximately Thirty Thousand Dollars, as was involved in this transaction, in cash for payment upon such contract. This is especially true when the exact amount involved cannot be ascertained until after the sheep have been weighed, and the amount due upon the contract must be estimated beforehand in order surely to be prepared for the payment.

Thus, when a party goes to receive sheep, and is pre-

pared to make payment by valid check or draft, and, as in the case in question, is prepared to give a guaranty that would satisfy any ordinary man that such check or draft would be paid, he certainly has done all that can be expected of him under the usual method of business transactions, especially when the contract does not mention the medium of payment required, and no notice is given that legal tender will be demanded, thereby putting the purchaser on his guard.

When, therefore, the defendants, upon tender of a valid check and draft, refsued to accept the same, and demanded legal tender money or the currency, a delay was necessarily involved to enable plaintiff to procure such legal tender money or currency. The delay, then, was due to the act of the defendants in asking and demanding of plaintiff that he do something which had not been anticipated by plaintiff, and, which under the usual methods of transacting business, would not be expected.

Although time is made of the essence of the contract, "if the party prevents performance by the other, he cannot insist on the stipulation."

C. J., 689.

> "The grantor of an option who prevents its exercise during the time limited must give a reasonable time for its exercise after any obstruction that he has interposed is removed."

13 C. J., 689.

3 Elliott on Contracts, Sec. 1912.

Other cases sustaining the general proposition that the party preventing performance within the time limited, cannot insist upon the stipulation as to time being of the essence of the contract, are as follows:

King Iron Bridge & Mfg. Co. vs. St. Louis, 43 Fed., 768. 10 L. R. A., 826.

Ward vs. Matthews, 14 Pac., 604.

District of Columbia vs. Camden Iron Works, 21 Sup. Crt. Rep., 680.

Hollister Bros. vs. Bruthenthal & Bickert, et al., 70 S. E., 970. (Ga.)

Stimpson Computing Scales Co. vs. Taylor, 61 S. E., 1131. (Ga.)

Ritchie vs. Topeka, 138 Pac., 618. (Kan.)

Rees vs. Logsdon, 11 Atl., 708. (Md.)

Dannat vs. Fuller, 24 N. E., 815. (N. Y.)

Spina vs. Arcadia Orchards Co., 131 Pac., 218. (Wash.)

McDonald vs. Cole, 32 S. E., 1033. (W. Va.)

Case vs. Beyer, et al., 125 N. W., 947. (Wis.)

First Nat. Bank of Portland vs. Carroll, 35 Mont., 302.

"Where a stipulation for performance at a particular time has been waived, the party in whose favor the waiver operates is thereafter bound only to perform within a reasonable time."

13 C. J., 690.

Inasmuch as respondents interposed a condition of performance on the part of appellant which involved a delay beyond the time limited by the contract, then necessarily the stipulation as to time was waived, and appellant had a reasonable time within which to comply with such condition.

A payment or tender of payment by check is sufficient unless objection is made to the tender on the ground that it is not cash.

Milwaukee Land Co. vs. Ruesink, et al., 50 Mont., 489. See 506.

In this case, then, the tender by appellant of a valid check and draft was sufficient up to the time of defendants' refusal to accept the same. If sufficient until defendants made objection, then surely opportunity must be given appellant to meet the objection so made.

If party makes tender of check, without notice that legal tender money will be required, and such check is refused, party should have opportunity of securing the money and making a good and valid tender.

McGrath vs. Gegnor, 26 Atl., 502.

Shaeffer vs. Coldren, 85 Atl., 98.

Sharp vs. Todd, 38 N. J., Eq., 324.

> "We take it to be well settled that, where a tender is made, whether it be by ordinary bank notes or by check on a bank, and the tender is refused, not because of the character or quality or the tender itself, but on other grounds, the tender thus made and refused will be considered in law lawful tender; and for the reason that all objections to the character of the tender will be considered as having been waived; *and for the further reason that, if objection had been made on the ground that the tender was not made in lawful money, the party would have had the opportunity of getting the money and making good and valid tender."* (Italics ours.)

McGrath vs. Gegnor, 26 Atl., 502.

Thus, under the reasoning and law above set forth, plaintiff contends that upon defendants' making objection to his valid check and draft, offered by him, and upon his offer to satisfy such objection by procuring the legal tender money,

and they having refused to give him a chance to get it, he was not in default, and they had no right to repudiate the contract.

B.

Specifications of error No. 2, 3, 4, 7, 8, 9, 10, and 12, involve the admissibility of evidence on the part of plaintiff, showing the arrangements that he had made for the payment of check or draft that might be drawn in payment of the sheep in question.

Such evidence is admissible for the purpose of showing the plaintiff's ability and readiness to perform his part of the contract.

Ives vs. Atlantic, etc., R. Co., 55 S. E., 74.

Plaintiff offered, in support of the check which he tendered in payment, the testimony of the Cashier of the Bank at Fort Morgan, Colorado, upon which the check was to be drawn, setting forth the responsibility of the bank, and also the fact that arrangements had been made to honor any check that should be drawn upon it in payment of the sheep purchased under the contract in question.

The plaintiff also offered guaranty by Montana National Bank of the draft which was tendered in payment, said bank being an active bank of Billings, Montana, and also the guaranty by Hatcher & Snyder of said draft, and their responsibility, which was ample to take care of it.

C.

Specification of error No. 11 involves the offer of plaintiff to introduce in evidence Exhibit No. 3, which was a written offer to produce the legal tender money in payment for the sheep in question, and an offer of compensation for any delay that might result to the defendants.

While this offer of compensation and to procure the legal tender was made the day after the last day mentioned in the contract for its fulfillment, yet it was upon Sunday, and before any opportunity had been given to secure the legal tender and make the payment, and in confirmation of the verbal offer of the day before.

> "An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property."

Rev. Codes of Mont., 1907, Sec. 8036.

D.

Specification of error No. 13 involves the refusal of the Court to allow the amendment to the complaint asked for by the plaintiff.

The proposed amendment was as follows:

> "That the above mentioned offer was made by valid check and draft after the banks had closed on the 29th day of September, 1917; that said check and draft were refused; that the plaintiff thereupon offered to secure the legal tender money for such payment as soon as it could be telegraphed to Glasgow, Montana, from his home at Fort Morgan, Colorado, and that the defendants refused said offer, and thereupon sold said lambs to one Johnson."

Plaintiff asked for this amendment, not because he deemed his complaint insufficient, but to save any question in regard thereto. Plaintiff contends that the complaint sets forth performance upon the part of plaintiff, which is sufficient to constitute a good cause of action, and that his acts did constitute a full performance of all the obligations rest-

ing upon him insofar as to entitle him to base his action to recover upon the contract.

If, however, such should not be deemed by this Court to be the law, and it was necessary for the plaintiff to set forth the facts whereby the time for payment of the purchase was necessarily extended, then the Court should have allowed the amendment, in the interest of justice between the parties.

E.

Assignment of error No. 14 relates to the offer of plaintiff to show by the witness, James E. Rea, the market value of lambs in question at the weighing point.

This testimony was excluded as immaterial, inasmuch as under the theory of the case adopted by the lower Court, plaintiff was unable to establish any case by reason of its failure to show sufficient performance or offer of performance on his part.

If plaintiff's contention as to the sufficiency of his performance should be sustained, then, of course, the Court erred in rejecting this testimony.

Under all the circumstances of this case, plaintiff submits that the District Court erred in excluding the offered evidence, and in directing verdict for defendants.

Respectfully submitted,

F. B. REYNOLDS,

Attorney for Appellant.